

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BUNGIE, INC.,

Plaintiff,

v.

AIMJUNKIES.COM; PHOENIX DIGITAL
GROUP, LLC; DAVID SCHAEFER; JORDAN
GREEN; JEFFREY CONWAY; and JAMES
MAY,

Defendants.

No. 2:21-cv-00811

PLAINTIFF BUNGIE, INC.'S TRIAL
BRIEF

BUNGIE'S TRIAL BRIEF
(No. 2:21-cv-00811)

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1 Plaintiff Bungie, Inc. (“Bungie” or “Plaintiff”) respectfully submits this trial brief:

2 I. STATEMENT OF THE CASE

3 Bungie asserted nine claims against Defendants for their development and sale of cheat
4 software for Bungie’s *Destiny 2* and *Destiny 2: Beyond Light*¹ video games (“Cheat Software”).
5 Dkt. Nos. 1, 34. This Court referred six claims to arbitration, where arbitrator Judge Ronald Cox
6 (Ret.) found Defendants liable for circumventing technological measures and trafficking in
7 circumvention technology in violation of the DMCA, breach of contract, tortious interference, and
8 violation of the Washington Consumer Protection Act, and awarded Bungie damages and
9 injunctive relief. Dkt. No. 89-1 (“Final Award”). This Court confirmed the arbitration award on
10 June 13, 2023. Dkt. No. 140.

11 Binding factual findings from the confirmed Final Award, and facts admitted by both
12 parties in this case, significantly narrow the issues for trial. These binding factual findings and
13 admitted facts include, but are not limited to:

- 14 • Bungie owns copyrights in *Destiny 2* and *Destiny 2: Beyond Light*;
- 15 • Defendant James May reverse engineered *Destiny 2* to develop the cheat software
16 for *Destiny 2* that the remaining Defendants sold on AimJunkies.com (the “Cheat
17 Software”);
- 18 • May did so in concert with and for the benefit of the other Defendants;
- 19 • Defendants Schaefer, Green, and Conway were equal 1/3 owners in Defendant
20 Phoenix Digital Group, LLC, which distributed the Cheat Software through
21 AimJunkies.com; and
- 22 • To operate, the Cheat Software necessarily creates (a) unauthorized copies of
23 *Destiny 2* code, and (b) unauthorized derivative works based on *Destiny 2*.

24
25
26 ¹ Unless otherwise specified, *Destiny 2* and *Destiny 2: Beyond Light* shall be referred to collectively as
“*Destiny 2*.”

1 Based on these facts—which are stipulated or have binding preclusive effect in this case—
 2 very little remains to be found at trial to find Defendants liable on Bungie’s only remaining claim
 3 for copyright infringement.² Bungie asserts three theories of copyright infringement: direct,
 4 contributory, and vicarious. Bungie seeks at least \$43,210 in damages in connection with this
 5 claim, as well as Bungie’s reasonable attorneys’ fees and costs, and permanent injunctive relief.

6 May asserted four counterclaims and Phoenix Digital also asserted a counterclaim; the
 7 Court dismissed all except one with prejudice on summary judgment. Dkt. No. 201. May’s one
 8 remaining counterclaims alleges that Bungie violated the anticircumvention provision of the
 9 Digital Millennium Copyright Act (17 U.S.C. § 1201) (“DMCA”).

10 II. STATEMENT OF EVIDENCE

11 A. Bungie and *Destiny 2*

12 *Destiny 2* is a successful shared-world first-person shooter video game. Originally released
 13 in September 2017, *Destiny 2* is now free-to-play and enjoyed by an estimated player base of over
 14 30 million players. Bungie released *Destiny 2: Beyond Light*, one of its paid expansions, on
 15 November 10, 2020. Bungie owns all rights, title, and interest in the copyrights in *Destiny 2*
 16 including its computer software and the audiovisual works that software creates, which are the
 17 subject of four U.S. copyright registrations. TX 1-4.

18 Among other things, Bungie’s copyrighted computer software consists of data structures
 19 that correspond to certain attributes of *Destiny 2*, including, for example, player positioning (the
 20 locations of players and non-player characters) and rendering (code that determines what players
 21 see from their characters’ position). The data structures provide a precise layout for individual
 22 pieces of data stored and organized in a computer’s memory, so that the game functions as
 23 intended. Bungie’s copyrighted computer software for *Destiny 2* includes what is commonly
 24 referred to as the *Destiny 2* “game engine.”

25
 26 ² Bungie has elected not to pursue its trademark infringement or false designation of origin claims at trial.

1 Bungie will rely on two technical experts at trial—Steven Guris and Edward Kaiser, Ph.D.
 2 Mr. Guris has a B.S. in software engineering, is the Director of Threat Investigations at Unit 221B,
 3 a cybersecurity firm, and has extensive experience with *Destiny 2*. He will testify regarding his
 4 analysis Defendants’ Cheat Software loader and the irreparable harm inflicted by the Cheat
 5 Software on Bungie.

6 Dr. Kaiser has a Bachelor of Applied Science in Computer Engineering and a Ph.D. in
 7 Computer Science, Network Security and is an Engineering Lead and head of Bungie’s Product
 8 Security Team. He has substantial experience, including in connection with his doctoral thesis,
 9 identifying, investigating, and implementing fixes to stop cheaters and other bad actors in *Destiny*
 10 2. Dr. Kaiser also wrote portions of the code for *Destiny 2*, including code that interacts with
 11 player inputs and player and combatant positioning data structures, and is intimately familiar with
 12 the game and its operation.

13 **B. Defendants’ History of Cheat Development**

14 In 2012, David Schaefer, Jeffrey Conway, and Jordan Green formed and became equal 1/3
 15 owners of Phoenix Digital Group LLC (collectively referred to as the “Phoenix Digital
 16 Defendants”). Phoenix Digital’s sole business purpose was to develop and sell cheats for video
 17 games from websites, including Aimjunkies.com. Although each had full control and authority to
 18 manage Phoenix Digital (TX 21 (Phoenix Digital LLC Agreement) ¶ 4.3), generally Conway
 19 managed finances, Green performed engineering work (including testing and verifying cheats),
 20 and Schaefer acted as the general business manager. Schaefer directed almost all of Phoenix
 21 Digital’s actions. Indeed, Conway has testified that he acted at Schaefer’s command, “blindly”
 22 and without “exceris[ing] [] independent thought[.]” Schaefer personally controlled every aspect
 23 of the cheat sales—communicating with developers, deciding whether to sell a cheat, allocating
 24 profits from sales, and deciding when to stop selling a cheat. Bungie will demonstrate that
 25 Defendant James May developed cheats for Phoenix Digital and shared in profits from Phoenix
 26 Digital’s sales. Mr. May will testify that, at all relevant times, May had no other income and

1 distributed cheats he developed only through Phoenix Digital and its websites, including
2 AimJunkies.com.

3 For cheats developed by May and sold through AimJunkies.com, Schaefer, Conway,
4 Green, and May each shared the profits. May received 50%, and Schafer, Conway, and Green
5 split the remaining 50% evenly. Those profits were substantial: Defendants sold nearly \$1 million
6 in cheats *from 2019 - 2020 alone*.

7 **C. Defendants Developed the Cheat Software**

8 The evidence will show that Defendants developed the Cheat Software throughout 2019.
9 In or around October 2019, May began reverse engineering *Destiny 2* using a variety of tools,
10 including Phoenix Digital’s “in-house tool” that it provided to cheat developers and that was
11 digitally signed by Phoenix Digital with credentials provided by Schaefer. *See* TX 138. May will
12 admit that he was reverse engineering *Destiny 2* in order to help develop a cheat for *Destiny 2*.

13 Bungie will present evidence that Defendants continually updated the Cheat Software,
14 releasing at least three versions. In November 2019, Phoenix Digital announced it would soon be
15 releasing a cheat for *Destiny 2*. TX 72.002 (Phoenix Digital promotional email). On or around
16 December 17, 2019, Phoenix Digital released its first version with an “Extra-Sensory Perception”
17 (“ESP”) feature, allowing cheaters to see through walls. TX 72.010 (Defendants’ promotional
18 email). A few days later, December 23, 2019, Phoenix Digital released a second “full” version of
19 the Cheat Software with new features such as “AIMBOT,” and “One Position Kill” (“OPK”). TX
20 72.012. About one year later, on November 11, 2020, Phoenix Digital released a third version of
21 the Cheat Software for use with Bungie’s new expansion, *Destiny 2: Beyond Light*. TX 112 (Tweet
22 announcing release of updated Cheat Software). Despite Bungie banning him on numerous
23 occasions, May assisted with all of these versions, repeatedly connected reverse engineering tools
24 to *Destiny 2* from October to May 2021, circumventing *Destiny 2*’s technological protections on
25 at least 100 separate occasions that Bungie detected. TX 138.
26

D. How the Cheat Software Operates

Defendants' Cheat Software gives cheaters an unfair advantage by adding unauthorized features, including ESP, AIMBOT, and OPK. Defendants admit that the Cheat Software includes these features and what they do (e.g., see through walls). Defendants otherwise claim to not know how the Cheat Software and its loader operates. Only Bungie's experts, Dr. Kaiser and Mr. Guris, can and will testify about how the software operates, and Defendants did not and cannot refute this testimony.

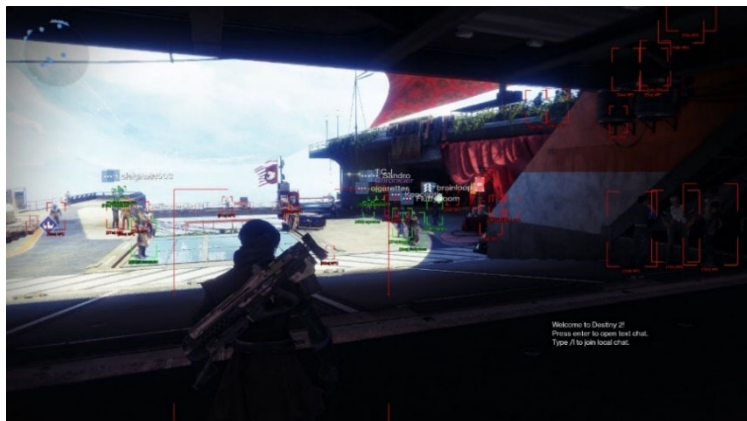
1. The ESP Cheat Feature

The ESP feature allows cheaters to see the location of other players and non-player characters, including through solid walls. As illustrated in the screenshots below, the Cheat Software displays a box around the other players with their names and distance from the cheater.

Normal Player's View



Player's View Using Defendants' Cheat Software



1 Dr. Kaiser will testify regarding how the developer of the Cheat Software infringed
2 Bungie's copyrights and violated the LSLA, including by accessing a local copy of the client
3 software of *Destiny 2* to reverse engineer it, copying code, and making derivative works. Mr. May
4 will confirm that he did, in fact, accessed and reverse engineered *Destiny 2* many times.

5 Dr. Kaiser will testify regarding how the Cheat Software itself necessarily infringes in
6 order to function. In order to display player locations, the Cheat Software must copy and modify
7 Bungie's copyrighted computer software. In particular, to enable the ESP feature, Defendants
8 copied the code related to the data structures for player positioning and rendering and reverse
9 engineered that code.³ Defendants then incorporated derivatives of the copied code into the Cheat
10 Software. When in use, the Cheat Software creates a modified version of the visual display.
11 Cheaters run a copy of *Destiny 2* on their computers while also running a copy of the Cheat
12 Software; the Cheat Software injects its code into (*i.e.*, runs its software code inside) the *Destiny*
13 2 game engine; the injected code extracts the normally-inaccessible data about player positioning
14 and manipulates the rendering data; and the Cheat Software then utilizes the game's camera and
15 display functions to display the boxes and player information to the cheaters.

16 Each time Bungie updated its code, Defendants updated their Cheat Software to enable its
17 functionality with the updated code, creating new copies of the data structures and software code
18 and incorporating them into the updated Cheat Software. At a minimum, Defendants updated their
19 Cheat Software (a) on or around December 23, 2019 when they released the "full" version of the
20 cheat (TX 72.012) and (b) on or around November 11, 2020 when they released a version for the
21 *Destiny 2: Beyond Light* expansion (TX 112).

22
23
24
25
26 ³ Bungie employs measures to obfuscate this code from would-be attackers with a form of encryption that
could not have been broken but for Defendants' copying and reverse engineering against that code.

2. The AIMBOT Cheat Feature

Accuracy is also an essential skill in a first-person shooter game like *Destiny 2*. The AIMBOT feature allows cheaters to aim weapons automatically and accurately (*i.e.*, without movement of the mouse and/or controller joystick), also providing a hugely unfair advantage.

Dr. Kaiser will explain that, as with the ESP feature, to provide the AIMBOT feature, Defendants copied the code related to the data structures for player positioning (*i.e.*, the target at which the player aims their weapon), reverse engineered the *Destiny 2* software code that calculates the angle deltas for mouse movements (*i.e.*, software code used to calculate how far the weapon cursor moves in *Destiny 2* in response to inputs), and then incorporated code derived from the copies into the Cheat Software. The Cheat Software also injects code into the game engine that allow the AIMBOT feature to function. And, like the ESP feature, Defendants made additional copies of Bungie's software code to keep the AIMBOT feature working with the updated versions of *Destiny 2*.

3. The One Position Kill Cheat Feature

The OPK feature shortcuts *Destiny 2*'s skill-based combat progression by allowing cheaters to move other players and characters to a single position so that the cheater can damage them all at once. Like the Cheat Software's other features, to enable OPK, Defendants copied the code related to the data structures for player positioning and combatant positioning to permit reverse engineering; incorporated cheat code derived from the copied code into the Cheat Software; and injected that cheat code that modifies player input data structures and functionalities into *Destiny 2* on the cheaters' computers. Similarly, Defendants updated the Cheat Software to reflect Bungie's updates to *Destiny 2*.

4. The Cheat Loader

Cheat Software users must also download a loader from AimJunkies.com. As Mr. Guris will explain, the cheat loader—a third party product that Defendants distributed with the purchase of the Cheat Software—injects the Cheat Software into the *Destiny 2* process, allowing the cheat

1 to operate within and modify *Destiny 2*. Each cheater had to download Defendants' loader. Like
 2 malware, Defendants' loader requires extremely broad access to the cheater's computer to operate.
 3 Defendants' loader also circumvented Bungie's copyright protections by injecting code into the
 4 *Destiny 2* process.

5 **E. Defendants Profited from their Malicious Conduct and Harmed Bungie**

6 Due to Defendants' spoliation, the true number of Cheat Software sales cannot be known.
 7 But from the records that Defendants did not destroy and those produced by third parties,
 8 Defendants sold a minimum of 1,406 copies of the Cheat Software, totaling over \$43,210 in sales.
 9 Each Defendant received a portion of the Cheat Software revenue.

10 In addition to profiting from their actions, Defendants' Cheat Software also directly harmed
 11 Bungie. Mr. Guris will testify regarding his opinions that cheaters poison the experience for
 12 legitimate players and devalue the larger ecosystem built around an online live-service multiplayer
 13 game such as *Destiny 2*, where retention of invested players is paramount. Even a small number
 14 of cheaters drives away retained players and drops the popularity of a game among new players.

15 Here, Bungie's *Destiny 2* player base has been harmed by Defendants' conduct. Bungie
 16 recorded more than 6,000 complaints about players using the Cheat Software and spent millions
 17 of dollars combatting cheaters and cheat developers such as Defendants in order to protect its
 18 player base. TX 136.

19 **F. May's DMCA Counterclaim**

20 May alleges that Bungie circumvented technological protections on his computer to access
 21 certain files. May admits to and was found liable for violating the DMCA anti-circumvention
 22 provision by reverse engineering *Destiny 2*. Dr. Kaiser will testify that when May connected
 23 reverse engineering tools to the *Destiny 2* process, or ran processes on his computer at the same
 24 time as *Destiny 2*, the *Destiny 2* process obtained metadata (e.g., file headers containing file path
 25 information) and recorded an MD5 hash—a string of numbers and letters that serves as a unique
 26 identifier or digital watermark—of those tools and programs that May was using. Incredibly, May

1 now asserts that Bungie’s discovery of **his** reverse engineering—which was held to violate the
 2 DMCA anti-circumvention provision—somehow shows that **Bungie** circumvented May’s
 3 technological protections. The conduct of which May complains, however, was simply the *Destiny*
 4 2 process identifying malicious programs that were connected or running parallel to it, like May’s
 5 reverse engineering tools.

6 May will admit that he also agreed to Bungie’s collection of this data by accepting Bungie’s
 7 Limited Software License Agreement (“LSLA”) which incorporates by reference Bungie’s
 8 Privacy Policy. TX 20 (LSLA); TX 205 (Bungie’s Privacy Policy). May will also admit that he
 9 changed the names of reverse engineering files on his computer, on the assumption that those file
 10 names could be detected by video game developers. By agreeing to the Privacy Policy, May
 11 consented to Bungie “collect[ing] Personal Information about you and your use of the Bungie
 12 Services via automated means, such as through cookies, web beacons and similar technologies,”
 13 including information such as, but not limited to:

- 14 • Bungie Services Use Data, including information about your use of the Bungie
 15 Services, the pages and content that you view, the referring and existing pages, your
 16 access times, the links you click, and other actions taken within the Bungie
 17 Services.
- 18 • Device Data, including information regarding your device, such as device type,
 19 operating system type, browser type, device regional and language settings, IP
 20 address, and device ID (such as IDFA or AAID).

21 TX 205 at 4. This information is collected by Bungie to, among other reasons, “prevent
 22 fraudulent use of the Bungie Services,” “enforce our Terms of Use [and] our legal rights,” and
 23 “prevent or address potential or actual injury or interference with our rights, property, operations,
 24 users or others who may be harmed or may suffer loss or damage.” *Id.* at 6. To collect data that
 25 is helpful in preventing fraudulent uses of the Bungie Services and in protecting Bungie’s
 26 intellectual property rights, *Destiny 2* detects potentially malicious processes that can interfere

with *Destiny 2*, such as cheat software or reverse engineering tools, computes an MD5 hash of the corresponding files as a unique file-identifier, and reports the MD5 hash to Bungie, if queried.

III. LEGAL ISSUES

A. Bungie's Copyright Infringement Claims

Bungie asserts three theories for copyright infringement: (1) Defendants directly infringed Bungie's copyrights in *Destiny 2* in their development and distribution of the Cheat Software; (2) Defendants contributorily infringed when they distributed the Cheat Software; and (3) Defendants vicariously infringed when they distributed the Cheat Software. The evidence will show that Defendants are liable under all three theories, and Bungie is entitled to recover at least \$43,210 in damages.

1. Bungie will prove all essential elements of its direct copyright infringement claim.

Bungie must prove two elements to succeed on its direct copyright infringement claim: (1) ownership of the infringed material and (2) that Defendants violated at least one exclusive right granted to copyright holders under 17 U.S.C. § 106. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). A copyright owner's exclusive rights include the rights to reproduce the copyrighted work, prepare derivative works based on the copyrighted work, and distribute copies of the copyrighted work. 17 U.S.C. § 106(1)–(4).

The first element is stipulated for trial. Bungie owns four copyright registrations covering the *Destiny 2* computer software code and audiovisual works that Defendants infringed. TX 1-4. These registrations protect the entirety of the computer software code and audiovisual components of the *Destiny 2* video game and the *Destiny 2: Beyond Light* expansion. *Id.* Bungie thus owns the infringed materials. *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011) (a copyright registration is prima facie evidence of the validity of the copyright).

1 As Dr. Kaiser will explain, the evidence will also show that Defendants violated Bungie's
2 exclusive rights to reproduce, prepare derivative works from, and distribute copies of its
3 copyrighted works.

4 **First**, to create the Cheat Software, Defendants copied *Destiny 2* twice. Defendants copied
5 certain portions of copyrighted software code from *Destiny 2*, reverse engineered against that code
6 to develop derivative cheat code, and incorporated that unauthorized derivative code into the Cheat
7 Software. Specifically, Defendants copied the data structures that correspond to player and
8 combatant positioning; and reverse-engineered the code dedicated to the game's rendering and
9 calculation of angle deltas for mouse movement; and incorporated a derivative of Bungie's
10 software code into the Cheat Software. Dr. Kaiser will explain how the Cheat Software's ESP,
11 AIMBOT, and OPK features could not function without this copied and reverse engineered code,
12 and Defendants could not have successfully reverse engineered against Bungie's code except by
13 experimentation against an unauthorized copy. That copying infringes Bungie's copyrights. *See*
14 *Ticketmaster L.L.C. v. Prestige Ent. W., Inc.*, 315 F. Supp. 3d 1147, 1161 (C.D. Cal. 2018) ("The
15 act of downloading and storing the pages and code of a website qualifies as making a 'copy' under
16 the Copyright Act . . ."). And, in order to create the Cheat Software, Defendants also downloaded
17 copies of the entirety of *Destiny 2* software code onto their computers. Defendants did so *after*
18 breaching LSLA, meaning that their license to access *Destiny 2* was terminated. Each download
19 of *Destiny 2* after their LSLA was terminated was thus unlicensed, and each copy was an
20 infringement.

21 Moreover, when Defendants updated the Cheat Software to ensure compatibility with
22 *Destiny 2* code updates, Defendants copied Bungie's updated code. Therefore, Defendants
23 infringed Bungie's exclusive right to copy or reproduce its copyrighted *Destiny 2* code, which is
24 alone sufficient for Bungie to prevail on its copyright infringement claim.

25 **Second**, as has been conclusively determined at the arbitration proceeding, the Cheat
26 Software creates derivative works of *Destiny 2* when it operates. This includes derivative works

1 based on the software code and the audiovisual works. Adding new features to a video game
 2 infringes the right to create derivative works. *See Micro Star v. Formgen Inc.*, 154 F.3d 1107,
 3 1112 (9th Cir. 1998) (levels of computer game burned onto a CD disk were derivative works in
 4 part because the levels manipulated the game code to create an altered visual display); *Dun &*
 5 *Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 208 (3d Cir. 2002); *Take-*
 6 *Two Interactive Software, Inc. v. Zipperer*, No. 18 Civ. 2608, 2018 WL 4347796, at *8 (S.D.N.Y.
 7 Aug. 16, 2018) (granting preliminary injunction where cheat developer created an alternative
 8 version of plaintiff's video game with "added elements that allow its users to use features not
 9 available" in the original game).

10 Here, the Cheat Software injects code into *Destiny 2*, including into the player positioning
 11 and player input data structures; the cheat code then manipulates those structures to create modified
 12 versions of the *Destiny 2* software code, i.e., derivative works based on the *Destiny 2* software
 13 code. The Cheat Software also creates modified audiovisual displays when the ESP feature draws
 14 boxes around *Destiny 2* characters and displays information about those characters. These are also
 15 unauthorized derivative works of the *Destiny 2* audiovisual copyrighted works.

16 ***Third and finally***, Defendants infringed Bungie's exclusive right to distribute copies of
 17 *Destiny 2*. As discussed above, Defendants sold more than 1,400 copies of the Cheat Software,
 18 which incorporated copies of code derived from Bungie's copyrighted code. Each sale of the
 19 Cheat Software violated Bungie's distribution right. *See Nexon Am., Inc. v. S.H.*, No. CV 10-9689
 20 (JCx), 2011 WL 13217951, at *4 (C.D. Cal. Dec. 13, 2011) (holding that defendant distributed
 21 infringing cheat software, which was a modified version plaintiff's video game software, by
 22 uploading it to a website where it was then downloaded by users); *see* TX 156.003 (Phoenix
 23 Digital's Supp. Resp. to ROG 6) (stating that the Cheat Software passes through a Phoenix Digital
 24 computer to the customer's computer).

1 **2. Bungie will prove all essential elements of its contributory copyright**
 2 **infringement claim.**

3 To be liable for contributory infringement, (1) the defendant must have knowledge of direct
 4 infringement; and (2) either induce, cause, or materially contribute to the infringing conduct.
 5 *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013). “[P]roviding the site
 6 and facilities for known infringing activity is sufficient to establish contributory liability.” *ALS*
 7 *Scan, Inc. v. Cloudflare, Inc.*, No. CV 16-5051 (AFMx), 2018 WL 11350606, at *9 (C.D. Cal.
 8 Mar. 13, 2018) (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).

9 That the Defendants’ customers directly infringed Bungie’s copyrights cannot be
 10 challenged because, as Judge Cox found, “[t]o operate, the cheats necessarily create unauthorized
 11 copies of the *Destiny 2* code and unauthorized derivative works.” TX 167.023 (Final Award).
 12 Defendants sold more than 1,400 copies of their Cheat Software. And Defendants are aware of
 13 the resulting infringement by their customers. TX 72 (advertising features of the Cheat Software
 14 on AimJunkies.com); TX 53 (AimJunkies.com website *Destiny 2* cheat information page); *see also*
 15 TX 67 (AimJunkies.com announcement looking for cheat developers with the “ability to reverse
 16 engineer” video games and knowledge of “anti-cheating strategies”). Defendants will also testify
 17 that they were the direct cause of and encouraged that infringement. *See, e.g.*, TX 72 (promotional
 18 emails). But for Defendants’ creation, advertising, and sale of the Cheat Software, the cheaters’
 19 infringement would not have occurred. Defendants therefore induced, caused, or materially
 20 contributed to the infringing conduct “by advertising and making the [Cheat Software] available
 21 for download on [their] website.” *Nintendo of Am., Inc. v. Storman*, No. CV 19-7818 (RAOx),
 22 2021 WL 4780329, at *4 (C.D. Cal. Aug. 5, 2021) (defendant contributorily infringed by
 23 distributing infringing copies of video games on his website).

24 **3. Bungie will prove all essential elements of its vicarious copyright**
 25 **infringement claim.**

26 Liability for vicarious copyright infringement extends to a defendant who “has the right
 and ability to supervise the infringing activity and also has a direct financial interest in such

activities.” *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (quoting *Fonovisa*, 76 F.3d at 262). A financial interest exists where “the availability of infringing material acts as a draw for customers.” *Nintendo of Am.*, 2021 WL 4780329, at *4. “A defendant ‘exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.’” *Broad. Music, Inc. v. Benchley Ventures, Inc.*, 131 F. Supp. 3d 1097, 1103 (W.D. Wash. 2015) (quoting *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007)).

Bungie will satisfy both elements. Defendants admit that they have both the right and practical ability to control their customers’ infringement. Schaefer concedes he made the decision to sell the Cheat Software and had the ability and authority to turn the Cheat Software “off” so it could not be used. In addition, Defendants admit to a direct financial interest in the Cheat Software—generating more than \$43,000 in sales from the Cheat Software. And, as advertised by the Defendants, the primary attraction of the Cheat Software were the features ESP, AIMBOT, and OPK, which individually and together infringe Bungie’s copyrights. TX 72 (promotional emails). Therefore, Defendants are vicariously liable for the cheaters’ infringement.

B. May’s DMCA Counterclaim Fails

James May asserts a single counterclaim against Bungie under the DMCA, claiming that Bungie hacked May’s computer when it detected May circumventing Bungie’s technological protection measures to create the Cheat Software for *Destiny 2*. The evidence will show that May’s counterclaim fails for multiple reasons. Under the DMCA, May must prove by a preponderance of the evidence that (1) he employs technological measures that effectively control access, (2) to May’s works that are protected by copyright, and that (3) Bungie circumvented those technological measures. 17 U.S.C. § 1201(a)(1)(A). May cannot meet this burden.

1 **1. None of the files Bungie allegedly accessed were works protected by**
 2 **copyright.**

3 First, the evidence will show that May does not own any works that are protected by
 4 copyright. “To the extent the [plaintiff’s software] is not a ‘work protected under [the copyright
 5 statute,]’ . . . the DMCA necessarily would not protect it.” *Lexmark Int’l, Inc. v. Static Control*
 6 *Components, Inc.*, 387 F.3d 522, 550 (6th Cir. 2004) (second alteration in original). May identifies
 7 four copyrighted works as protected by technological measures: blah64.exe, reclass.net.exe (a/k/a
 8 renamedreclass.exe), reclasskernel.sys, and reclasskernel64.pdb. The parties have stipulated to
 9 the fact that May has not registered these works.

10 “In the DMCA context, where a party has not registered its work, the absence of
 11 registration ‘makes it difficult for [a counterclaimant] to succeed on [his] DMCA claim, which is
 12 dependent on proof of a valid copyright.’” *Point 4 Data Corp. v. Tri-State Surgical Supply &*
 13 *Equip., Ltd.*, No. 11-CV-726, 2013 WL 4409434, at *17 (E.D.N.Y. Aug. 2, 2013) (quoting *Jagex*
 14 *Ltd. v. Impulse Software*, 750 F. Supp. 2d 228, 237 (D. Mass. 2010)). In *Point 4 Data Corp.*,
 15 “because plaintiffs [did] not have a registered copyright in the [software allegedly accessed by the
 16 defendant], the Court [needed to] examine whether plaintiffs [had] adduced sufficient evidence to
 17 establish a genuine issue of fact with respect to the copyrightability of their [s]oftware.” *Id.* This
 18 is because “not every element [of computer software], whether literal or nonliteral, is automatically
 19 entitled to protection,” but is instead subject to at least three doctrines that “define (and limit) the
 20 scope of copyright protection,” namely, “the exclusion of functional elements, the merger
 21 doctrine[,], and *the scenes a faire* doctrine.” *Id.* at *18 (internal footnotes omitted). “Thus, for
 22 computer software to merit copyright protection, **it is not enough for the party claiming**
 23 **protection to show that it independently created a certain number of lines of code.** On the
 24 contrary, the Court must undertake a highly complex analysis that typically requires expert
 25 evidence.” *Id.* (emphasis added). Thus, that court granted the defendant’s motion for summary
 26

1 judgment because “the evidence remaining in the record [was] not sufficient to create an issue of
2 fact with respect to the copyrightability of the [s]oftware [at issue].” *Id.* at *20.

3 This case is highly similar to *Point 4 Data*. May claims to own copyrights in four files,
4 relying exclusively on his assertion that he created the files or added functionality thereto. But the
5 evidence will show that May’s claim to copyright protection is unsupported by any other evidence.
6 He will testify that he has no copyright registrations; he offers no expert opinions on the issue; and
7 he has failed to demonstrate whether any portion(s) of his code overcome the functionality, merger,
8 and/or *scenes a faire* doctrines. May cannot meet this element of his DMCA claim to show that
9 his works are protected by copyright.

10 **2. Bungie did not circumvent May’s technological measures**

11 The evidence will also show that May’s DMCA claim fails because Bungie did not
12 “circumvent” any of May’s technological measures. “[C]ircumvent a technological measure’
13 means to descramble a scrambled work, to decrypt an encrypted work, or otherwise avoid, bypass,
14 remove, deactivate, or impair a technological measure, without the authority of the copyright
15 owner.” 17 U.S.C. § 1201(a)(3)(A). As relevant here, May claims to employ two types of
16 technological measures: two firewalls (one associated with his router, one on his computer) and
17 two layers of passwords (one to log onto his machine, another that protects his work files). And
18 May asserts two circumvention “theories”: (1) that Bungie allegedly misled May regarding what
19 information Bungie would collect from him, thus bypassing May’s technological measures, and
20 (2) that Bungie “avoided” May’s technological measures, although May cannot explain how
21 Bungie did so.

22 May’s first theory fails for two reasons. As a threshold matter, “misleading” is not
23 circumvention under the DMCA: “using deception to gain access to copyrighted material is not
24 the type of ‘circumvention’ that Congress intended to combat in passing the DMCA.” *Dish*
25 *Network L.L.C. v. World Cable Inc.*, 893 F. Supp. 2d 452, 464 (E.D.N.Y. 2012) (denying plaintiff
26 leave to file second amended complaint with DMCA claim in which plaintiff alleged defendant

1 obtained access to decrypted signals through “fraud and deceit”); *see, e.g., Adobe Sys. Inc. v. A &*
 2 *S Elecs., Inc.*, No. C 15-2288, 2015 WL 13022288, at *8 (N.D. Cal. Aug. 19, 2015) (granting
 3 motion to dismiss DMCA claim where only alleged act of circumvention was unauthorized
 4 distribution of otherwise genuine software license keys); *TLS Grp., S.A. v. NuCloud Glob., Inc.*,
 5 No. 15-CV-00533, 2016 WL 1562910, at *9 (D. Utah Apr. 18, 2016). Thus, Bungie’s alleged
 6 “deceit and subterfuge,” is not actionable. And in any event, there was no misrepresentation about
 7 the information Bungie collected from May.

8 May’s second theory—the unexplained “avoiding” of his technological measures—fails
 9 by his own admissions. The evidence will show that May downloaded Bungie’s *Destiny 2* video
 10 game onto his computer. When he did so, May granted *Destiny 2* permissions sufficient to access
 11 his computer through both of his firewalls, including “private access” through his Windows
 12 Firewall, broad access to the processes running at the same time as *Destiny 2*, and in particular to
 13 processes that attached to the *Destiny 2* game. When May granted *Destiny 2* this access, he knew
 14 that it can access anything on May’s computer while *Destiny 2* is running. Thus, because May
 15 gave Bungie permission, it never had to circumvent any of May’s firewalls. Bungie similarly
 16 never avoided May’s passwords. May downloaded *Destiny 2* onto his computer, and so Bungie
 17 could not have “avoided” May’s Windows login password. As to his password-protected work
 18 files, May had already opened and begun running them while *Destiny 2* was running, so again
 19 Bungie did not avoid those passwords. Bungie did not circumvent May’s technological protection
 20 measures, and Bungie’s motion should be granted.

21 **3. May consented to Bungie’s access**

22 Because May authorized Bungie to access his computer and view or obtain certain
 23 information, his DMCA claim fails.

24 Here, Bungie will demonstrate that May expressly authorized Bungie’s access to his
 25 computer when he accepted Bungie’s Privacy Policy. Under the Privacy Policy, Bungie is
 26 authorized to collect device data necessary to prevent fraudulent or malicious activity, including

1 files open and information about processes operating on a user's device while using *Destiny 2*. TX
 2 205. May alleges that Bungie accessed only the files listed in the documents attached to his
 3 amended counterclaims. TX 138. But Bungie detected these files only because May opened them
 4 while running *Destiny 2*, and while he was reverse engineering *Destiny 2*. Bungie collected
 5 precisely what the Privacy Policy disclosed: information about May's device and his use of
 6 Bungie's services to detect fraudulent and infringing conduct.

7 May's conduct reinforces his consent. To avoid getting banned from *Destiny 2* while using
 8 his reverse engineering tools, May changed the names of the files he was using **because he knew**
 9 **Destiny 2 could read them**. Indeed, May admits that for at least one of his files, he "might have
 10 just renamed the actual file for *Destiny 2*" because "some anti-cheats check for the name of the
 11 executable that's running." May consented to *Destiny 2*'s alleged accessing of his files, and so his
 12 DMCA claim must fail.

13 IV. EVIDENTIARY ISSUES

14 Bungie has raised its significant evidentiary issues in its Motion in Limine (Dkt. No. 205),
 15 and has further objected to specific trial exhibits intended to be offered by Defendants, as explained
 16 in the Proposed Pretrial Order.

17 V. DAMAGES AND INJUNCTIVE RELIEF

18 A. Bungie Is Entitled to At Least \$43,210 in Damages

19 An infringer is liable for either "(1) the copyright owner's actual damages and any
 20 additional profits of the infringer, or (2) statutory damages." 17 U.S.C. § 504(a). Here, Bungie
 21 has elected to pursue the former. In calculating these damages, Bungie is "entitled to recover the
 22 actual damages suffered by [Bungie] as a result of the infringement, and any profits of
 23 [Defendants] that are attributable to the infringement and are not taken into account in computing
 24 the actual damages." 17 U.S.C. § 504(b). Bungie is required to present proof only of Defendants'
 25 gross revenue, and Defendants must profit their deductible expenses and elements of profits
 26 attributable to factors other than their infringement. *Id.*

Here, Defendants’ total profits from the Cheat Software are unknown because Defendants deleted financial records relating to the sales of the Cheat Software and website records that would show the number of copies of the Cheat Software sold. Dkt. No. 216. From the limited records that Defendants produced and that Bungie obtained from third parties, Defendants sold at least 1,406 copies of the Cheat Software, totaling over \$43,210 in sales. But Defendants’ true revenue and profits are a mystery—even to Defendants. Defendants themselves have represented different amounts in revenue generated from the sales of Cheat Software throughout this litigation. TX 145 (Dkt. No. 28-5) (“During the entire life of the products [Bungie] refers to as ‘cheat software,’ overall sales of the products were \$27,748.00 and Phoenix Digital Group’s gross profits on these sales amounted to \$13,874.”). Because Defendants intentionally deleted evidence that would show the total volume of sales and gross revenues from the Cheat Software, the jury may presume that this evidence was unfavorable to Defendants, and Bungie requests \$43,210 in total damages owed to Defendants’ profits.

B. Bungie Is Entitled to a Permanent Injunction

A permanent injunction is available under the Copyright Act. *See* 17 U.S.C. § 502(a). Courts apply a four-factor test in determining whether to grant an injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Microsoft Corp. v. Buy More, Inc.*, 136 F. Supp. 3d 1148, 1158 (C.D. Cal. 2015), *aff’d*, 703 F. App’x 476 (9th Cir. 2017). Specifically, courts examine whether (1) the plaintiff has suffered irreparable injury; (2) there is an adequate remedy at law; (3) a remedy in equity is warranted, considering the balance of hardships between the plaintiff and the defendant; and (4) it is in the public’s interest to issue the injunction. *Id.* Each factor weighs in favor of an injunction.

Moreover, Defendants’ distribution of the Cheat Software has caused Bungie irreparable harm for which there is no adequate remedy at law to its game community and player base. As Mr. Guris will explain, the presence of cheaters within the *Destiny 2* game environment damages Bungie, poisons the well for players and content creators, and creates an unsustainable and unsafe

environment for legitimate players. The third and fourth factors likewise support granting a permanent injunction. The balance of hardship favors an injunction where, as here, the injunction would merely prohibit Defendants from infringing Bungie’s copyrights. *Microsoft Corp.*, 136 F. Supp. 3d at 1158 (citing *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135-36 (9th Cir. 1986)). Moreover, Defendants assert they have sold AimJunkies.com and no longer distribute the Cheat Software; thus, an injunction does not cause them any prejudice. However, the threat of Defendants continuing to sell the Cheat Software—or to develop a new cheat for *Destiny 2*—remains highly likely without an injunction. May continues to develop cheats for Phoenix Digital, and Phoenix Digital continues to be involved with the AimJunkies website. Finally, the public interest is served by upholding the rights provided under the Copyright Act. *Sennheiser*, 2013 WL 3811775, at *11; *Buy More, Inc.*, 136 F. Supp. 3d at 1159.

C. Bungie Is Entitled to Its Attorneys’ Fees and Costs

The Copyright Act also authorizes an award of reasonable costs and attorneys’ fees to the prevailing party. 17 U.S.C. § 505. Such an award is warranted under the circumstances here. A court may “freely award fees” to the prevailing party as long as it “seek[s] to promote the Copyright Act’s objectives,” which is designed to encourage plaintiffs to act to protect their copyrights. *Hist. Rsch. v. Cabral*, 80 F.3d 377, 378-79 (9th Cir. 1996) (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)). Willful infringement is not a prerequisite for an of award of attorneys’ fees, and attorneys’ fees are generally awarded to a prevailing plaintiff as a matter of course. *Frank Music Corp. v. Metro-Goldwyn Mayer Inc.*, 886 F.2d 1545, 1556 (9th Cir. 1989). Bungie should also recover its attorneys’ fees on May’s DMCA counterclaim, which permits the court to award reasonable attorneys’ fees to the prevailing party. 17 U.S.C. § 1203(b)(5).

D. May Is Not Entitled to Any Relief on His Counterclaim

In the unlikely event May prevails on his DMCA claim, he should recover little, if any, damages. The DMCA authorizes the court to award the claimant’s actual damages or statutory damages. 17 U.S.C. § 1203(c)(1). If the claimant requests actual damages, the court may award

1 “his actual damages suffered by the party as a result of the violation, and any profits of the violator
 2 that are attributable to the violation and not taken into account in computing actual damages.” 17
 3 U.S.C. § 1203(c)(2). If the claimant elects statutory damages, the court may award anywhere from
 4 \$200 up to \$2,500 per act of circumvention, “as the court considers just.” 17 U.S.C.
 5 § 1203(c)(3)(A). Among other factors that may be considered in setting statutory damages, the
 6 statutory damages should bear a plausible relationship to the actual damages suffered by the party.
 7 *Craigslist, Inc. v. Doe I*, No. C09-4739 SI (BZ), 2011 WL 1897423, at *5 (N.D. Cal. Apr. 25,
 8 2011).

9 Here, May “evidence” of his actual damages is highly suspect and, in any event, the actual
 10 damages he claims to have suffered are minimal. May claims that as a result of Bungie’s access
 11 to his computer he spent \$2,702 to purchase new computers and drives, and spent in excess of 40
 12 hours reviewing his files for indications of compromise, valued at \$75 per hour. But May readily
 13 admits that none of his computer components that he replaced were actually damaged or corrupted
 14 by Bungie. May also did not record (contemporaneously or otherwise) the supposed 40 hours he
 15 spent reviewing files, and his \$75 per hour valuation of his time is based on his own undocumented
 16 telephonic “survey” of seven or eight unidentified computer technicians and consultants in Ohio.
 17 And even if May’s evidence of harm is to be believed, it amounts to \$5,702 in “harm.” Any award
 18 of actual or statutory damages should be limited to no more than the actual harm May alleges to
 19 have suffered.

20 VI. CONCLUSION

21 For the reasons discussed above, the evidence to be presented at trial will show that Bungie
 22 is entitled to recover at least \$43,210 on its copyright infringement claims, in addition to Bungie’s
 23 attorneys’ fees and costs and injunctive relief against Defendants. The evidence presented at trial
 24 will also show that Bungie is not liable for violation of the DMCA, as alleged by James May.
 25
 26

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